Wong Ai Sung v Orix Credit Malaysia Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–35 OF 2005-II
HAMID SULTAN JC
16 APRIL 2007

Civil Procedure — Judgment and orders — Setting aside — Decision of sessions court judge to enter judgment while considering the appellant's application for preliminary issues — Whether procedurally wrong

Civil Procedure — Judicial precedent — Per incuriam — Stare decisis — Subordinate courts bound to follow decisions of its apex courts with limited discretion to apply per incuriam rule

Hire Purchase — Hire purchase agreement — Guarantee — Whether guarantee and indemnity void — Whether guarantor had undertaken to pay financier an aggregate sum which was larger than balance originally payable by hirer under hire purchase agreement — Whether guarantee and indemnity had to be executed in presence of magistrate, commissioner for oaths or notary public — Hire Purchase Act 1967 ss 21(3), 22

The respondent's claim against the appellant arises pursuant to a hire purchase agreement executed under the Hire Purchase Act 1967 ('HPA 1967'). The respondent was the owner (financier) of the vehicle in issue and the appellant was the guarantor with other guarantors. The appellant appealed against the decision of the sessions court judge, who while considering the appellant's application for preliminary issues, entered judgment in the respondent's favour. In addition, the appellant also complained that the sessions court judge was wrong in law to have entered judgment for the plaintiff on the ground that the only issue before the court was to try the preliminary issues and there was no formal application for entering judgment for the plaintiff.

Held, allowing the appeal:

(1) Any person who did not strictly comply with the provisions of the HPA 1967 or attempts to contract out of the strict provisions of s 22 of the HPA 1967 or if the conduct of the parties to the hire purchase agreement did not strictly comply with the procedural requirements such as getting the signatures of the hirer or guarantor in empty forms without filling in the particulars or not getting it properly attested may be fatal and the instrument may be declared void (see para 20).

(2) The definition of agreement, contract, guarantee and indemnity under the Contracts Act 1950 ('CA 1950') when read with the provisions of the HPA 1967 will become materially different and does not have the same effect as the HPA 1967 to a certain extent restricts or limits the scope of rights and obligations of guarantor or indemnifiers as provided in CA 1950, because it is the intention of parliament to do so. In this case it was necessary and essential to confine the interpretation of guarantee, indemnity, agreement, contract, etc within the context and spirit of the HPA 1967 (see para 21).

(3) The guarantee was not in compliance with s 22 of the HPA 1967 and in consequence was void, and s 21(3) of the HPA 1967 does not per se relate to indemnity and it was questionable whether it will be proper for financiers to seek for indemnity without giving consideration from a social guarantor or like under the HPA 1967. Further, subordinate courts are bound to follow the decisions of its apex courts and they have limited discretion to apply the per incuriam rule and if they do so it is necessary and essential to give detailed reasons for departing (see para 22); *Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd* [2004] 5 MLJ 308 followed.

(4) The parties to the action had only agreed for the issues to be tried and it was not procedurally correct for the sessions court judge to have had entered judgment where there were other issues which needed judicial consideration and on the facts of this case it could not be dismissed off summarily (see para 23).

[Bahasa Malaysia summary

Tuntutan responden terhadap perayu timbul menurut satu perjanjian sewa beli yang dimasuki di bawah Akta Sewa Beli 1967 ('ASB 1967'). Responden adalah pemilik (pembiaya) kenderaan yang dipersoalkan dan perayu adalah penjamin dengan penjamin-penjamin lain. Perayu telah merayu terhadap keputusan hakim mahkamah sesyen, yang semasa mempertimbangkan permohonan perayu untuk persoalan-persoalan awal, telah memasuki penghakiman menyebelahi responden. Tambahan pula, perayu juga telah mengadu bahawa hakim mahkamah sesyen terkhilaf dari segi undang-undang semasa memasuki penghakiman bagi pihak plaintiff atas alasan bahawa satu-satunya persoalan di hadapan mahkamah adalah untuk membicarakan persoalan-persoalan awal dan tiada permohonan rasmi untuk memasuki penghakiman bagi pihak plaintif.

Diputuskan, membenarkan rayuan tersebut:

(1) Sesiapa yang tidak mematuhi peruntukan ASB 1967 atau cuba untuk terkecuali daripada peruntukan ketat s 22 ASB 1967 atau jika perbuata pihak-pihak kepada perjanjian jual beli itu tidak mematuhi keperluan-keperluan prosedur seperti mendapatkan tandatangan penyewa atau penjamin dalam borang kosong tanpa mengisi butir-butir atau tidak mendapatkannya diaku saksi dengan betul mungkin memudaratkan dan instrumen itu dianggap tidak sah (lihat perenggan 20).

(2) Tafsiran perjanjian, kontrak, gerenti dan indemniti di bawah Akta Kontrak 1950 ('AK 1950') apabila dibaca dengan peruntukan ASB 1967 akan menjadi amat berbeza dan tidak mempunyai kesan yang sama seperti ASB 1967 setakat mana ia menghalang atau menghadkan skop hak-hak dan obligasi penjamin atau pemberi indemniti sepertimana yang diperuntukkan dalam AK 1950, kerana ia adalah niat parlimen untuk berbuat sedemikian. Dalam kes ini adalah perlu dan penting untuk menghadkan penafsiran gerenti, indemniti, perjanjian, kontrak dll dalam konteks dan maksud ASB 1967 (lihat perenggan 21).

(3) Gerenti tersebut tidak mematuhi s 22 ASB 1967 dan akibatnya ia adalah tidak sah, dan s 21(3) ASB 1967 tidak secara per se berkait dengan indemniti dan ia dipersoalkan sama ada ia adalah betul untuk pembiaya untuk memohon indemniti tanpa memberi balasan daripada penjamin sosial atau sepertinya di bawah ASB 1967. Bahkan, mahkamah bawahan terikat untuk mengikut keputusan mahkamah tertinggi dan mempunyai budi bicara terhad untuk menggunakan rukun per incuriam dan jika berbuat demikian adalah perlu dan penting untuk memberikan alasan yang terperinci untuk tiba kepada keputusan sedemikian (lihat perenggan 22); *Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd* [2004] 5 MLJ 308 diikut.

(4) Pihak-pihak kepada tindakan hanya bersetuju terhadap persoalan-persoalan yang perlu dibicarakan dan secara prosedurnya tidak betul untuk hakim mahkamah sesyen memasuki penghakiman di mana terdapat persoalan lain yang memerlukan pertimbangan kehakiman dan berdasarkan fakta kes ini ia tidak boleh diputuskan secara terus (lihat perenggan 23).]

Notes

For a case on per incuriam, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4318.
For cases on gurantee, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3888–3891.
For cases on setting aside of judgment and orders, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4216–4247.

Cases referred to

Argo Caribbean Group Ltd v Lewis [1976] 2 Lloyd's Law Report 289 (refd)
Bepin v Chunder Seekur Mookerjee (1880) 5 Cal 811 (refd)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293 (refd)
Equipment Investments v Dowthvaite & Co (1996) 16 FLR (refd)
Gajanan v Moreshar (1942) Bom 402 (refd)
Khetarpal v Madhukar Pictures 65 IA 286 (refd)
Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)
Richardson, Re; Ex parte the Governor of St Thomas Hospital (1911) 2 KB 705 (refd)
Secretary of State v Bank of India 65 IA 286 (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)
Siow Kwang Joon & Anor v Asia Commercial Finance (M) Bhd [1996] 3 MLJ 641 (refd)
Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd [2004] 5 MLJ 308 (folld)

Thean J in Goh Cheng Chuan v PP [1990] 3 MLJ 401 (refd)
Yang Chin Lang v Tan Chong & Sons Motor Co Ltd [1968] 2 MLJ 8 (refd)

Legislation referred to
Contracts Act 1950 ss 77, 78, 79, 80, 81, 93, 95, 98
Hire Purchase Act 1967 ss 21(3), 22
Native Land Code
Subordinate Court Rules 1980 O 28 r 10

Appeal from: Summons No 52–573 of 2000-I (Sessions Court, Kuching)

Leong Hsin Ru (Tang & Partners Advocates) for the appellant/third defendant.
Lau Mei Ling (Sim & Yee Advocates) for the respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the appellant/third defendant's appeal (encl 3) against the decision of the learned sessions judge who entered judgment for the respondent/plaintiff after deciding the appellant's application for issues to be tried pursuant to the order of the court below dated 3 May 2005.

[2] Respondent's claim against the appellant arises pursuant to a hire purchase agreement executed under the Hire Purchase Act 1967 ('HPA 1967'). The respondent was the owner (financier) of the vehicle in issue and the appellant was the guarantor with other guarantors, namely the second, third, fifth and the sixth defendants to this action. The first defendant is the hirer.

[3] The appellant before me has appealed against the decision of the learned sessions judge, who while considering the appellant's application for preliminary issues, entered judgment in the respondent/plaintiff's favour. In addition, the appellant also complains that the learned sessions judge was wrong in law to have entered judgment for the plaintiff on the ground that the only issue before the court was to try the preliminary issues and there was no formal application for entering judgment for the plaintiff.

[4] The preliminary issues before trial of the action before learned sessions judge was framed as follows:

(a) whether by entering into the purported guarantee and indemnity dated 28 May 1996, the third defendant had bound himself to pay to the plaintiff an aggregate sum which is larger than the balance originally payable under the hire purchase agreement dated 28 May 1996.

(b) whether the said purported guarantee and indemnity dated 28 May 1996 is null and void by virtue of s 22 of the HPA 1967.

A **[5]** For the purposes of the said preliminary issues to be tried, the following documents were filed in court: (a) statement of agreed facts; and (b) agreed bundle of documents. They read as follows:

Statement of Agreed Facts

B (1) the guarantee and indemnity dated 28 May 1996 was not executed in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

(2) the subject matter of the hire purchase agreement dated 28 May 1996 is governed by the HPA 1967.

Agreed Bundle of Documents

C (1) hire purchase agreement No 04-1996-00386-0 dated 28 May 1996.

(2) guarantee and indemnity for hire purchase agreement No 104-1996-00386-0 dated 28 May 1996.

D **[6]** The appellant in support of the appeal, inter alia, submits as follows:

(a) the learned sessions court judge erred in law and in fact:

(i) in concluding that the decision of *Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd* [2004] 5 MLJ 308 was not binding on the learned sessions judge in this matter.

E (ii) in deciding that s 22 of the HPA 1967 does not cover a contract of indemnity.

(b) in deciding the said purported guarantee and indemnity is not null and void by virtue of s 22 of the HPA 1967.

F (c) the learned sessions judge erred when she entered judgment summarily after disposing off the preliminary issues when there are other issues to be tried.

[7] The appellant asserts that the case of *Su Chii Leong* is binding on the learned sessions judge and, inter alia, submit as follows:

G (a) the principle of stare decisis dictates that a court is bound to follow decisions in former cases. In *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, Steve Shim CJ (as he then was) had the occasion to say as follows:

> It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practiced in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability...
>
> **H** Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehension in the judicial system…
>
> **I** The observation is but a stark reminder to judges of adhering to the doctrine.

(b) the learned sessions court judge was in error when she declined to follow the decision of Justice Datuk Clement Skinner in *Su Chii Leong* notwithstanding the facts of that case are so similar to that of the present matter. Besides, both

cases are indistinguishable as they involve similar documents and issues that is to say that: (i) the guarantee and indemnity was not executed in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public; and (ii) the subject matter of the hire purchase agreement is governed by the HPA 1967.

(c) the guarantee and indemnity contains the following express terms and conditions:

Clause 1, which states:

> In consideration of your entering at my/our request into the foregoing Hire Purchase Agreement with Bakunjaya Sdn Bhd, a Company incorporated in Malaysia and having a business office at No 3, 2nd Floor, Block A, King Centre, 93300 Kuching ('the Hirer') I/we the undersigned hereby jointly and severally guarantee on written demand by you the punctual payment by the Hirer of all sums which may become due to you under the said Hire Purchase Agreement or variation or extension thereof to be performed and observed by the hirer, and I/we further jointly and severally undertake to indemnify you against all losses expenses (including legal costs on a full indemnity basis) charges and damages incurred or suffered by you in consequence of any failure by the Hirer to perform any of the Hirer's obligations under the Hire Purchase Agreement.

Clause 4, which states:

> I/We hereby agree to indemnify you against all legal proceedings claims and demands whatsoever made by the Hirer arising out of any alleged warranty and/or representation or otherwise in respect of the goods.

(d) by virtue of these two clauses, the appellant had bound himself to pay to the respondent an aggregate sum which is larger than the balance originally payable under the hire purchase agreement by entering into the guarantee and indemnity.

(e) based on these sets of facts, Justice Datuk Clement Skinner in *Su Chii Leong* said as follows:

> Reverting to the guarantee which was executed by the appellant in this case, I agree with counsel for the appellant that for the reasons given by him, the appellant had, when entering into the guarantee, bound himself to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire purchase agreement. The guarantee should, therefore, have been executed in the presence of a magistrate, a Commissioner for Oaths or a notary public and not having been so executed, is void.

(f) the Federal Court has pronounced that where a case is indistinguishable on the facts from a previously decided case, then the court is bound by stare decisis to follow it as set out in the judgment of Ong Hock Thye FJ in *Yang Chin Lang v Tan Chong & Sons Motor Co Ltd* [1968] 2 MLJ 8.

(g) further, *Halsbury's Laws of England* states:

> 575. Decisions on matters of fact
>
> Except as between the parties or their privies, decisions upon matters of fact are not binding on any other court, even when given by the House of Lords. When a

A previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to erect a previous decision into a governing precedent merely because it contains what is simply resemblance of circumstances; but a case may be of use to show the way in which judges regard facts, and a decision that certain legal consequences follow from certain facts is binding in another case raising substantially B similar facts.

(h) the decision in *Su Chii Leong* was binding on the learned sessions court judge.

(i) the reasons the learned sessions court judge gave in declining to follow the decision of *Su Chii Leong* are as follows:

C

From the reading of the judgment of *Su Chii Leong*'s case, it would appear that the issue of whether s 22 of the Hire Purchase Act also covers contract of indemnity was not canvassed before His Lordship Justice Datuk Clement Skinner. The case of *Equipment Investments v Dowthvaite & Co* was also not referred to His Lordship. It would appear that this (sic) Lordship Justice Datuk Skinner had treated the Deed D of Guarantee and Indemnity as a guarantee. Given my view that the Deed of Guarantee and Indemnity dated 28.5.1996 is a deed of indemnity, I would respectfully (sic) hold that *Su Chii Leong* is not binding on me.

(j) those reasons given by the learned sessions court judge are flawed because it is not open to the learned sessions court judge to invoke the per incuriam rule E as the court is obliged to follow the doctrine of stare decisis. This position was clearly expressed by *Thean J in Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401:

In the instant case, unfortunately, the learned district judge declined to follow the decision of *Lai Kew Chai J in Abdul Rasheed* [1985] 1 MLJ 193 and it is best to set F out his reasons verbatim:

What was evidently not canvassed nor brought to the attention of his Lordship in that case was the role and the responsibility of the Attorney General, as the Public Prosecutor, over the institution, the conduct and the continuance, or otherwise, of all criminal prosecutions in Singapore. Neither was it brought to the attention of G his Lordship of the specific instances and situations provided for in the Criminal Procedure Code in which a court, in a summary trial, may order the acquittal of an accused person on a pending charge in a summary trial.

It is, with respect, my view that had these points (referred to in the preceding paragraph) been referred to and fully argued in that appeal before his Lordship, Lai H Kew Chai J, the resulting judgment may not have been as it is now reported.

In effect, the learned district judge was saying that the decision of Lai Kew Chai J was arrived at per incuriam. With respect, the learned district judge was in error. First, it is not open to a court to invoke the per incuriam rule against a court of superior jurisdiction. In *Baker v R* [1975] AC 774 at p 788, Lord Diplock in delivering the I judgment of the Board said:

Strictly speaking the per incuriam rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own previous decisions (*Young v Bristol Aeroplane Co Ltd* [1944] KB 718), does not apply to decisions of courts of appellate jurisdictions superior to that of the court in which the rule is sought

> to be invoked: *Broome v Cassell & Co Ltd* [1972] AC 1027. To permit this use of the per incuriam rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple devise of holding that decisions of superior courts with which it disagreed must have been given per incuriam.
>
> Hence, assuming that Lai Kew Chai J's decision was given per incuriam, it is still incumbent on the learned district judge to follow that decision and it is clearly not open to him to take the course which he did. There is no question that that decision is binding on him.

(k) the argument is further strengthened by *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 where Peh Swee Chin FCJ made the following remarks (at p 13):

> In this connection, it is interesting to refer to *Cassell & Co v Broome* [1972] AC 1027, 1054. It was held that courts in the lower tiers below the Court of Appeal could not rely on the per incuriam rule applied by Court of Appeal for itself, but could choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.

[8] Further the appellant asserts that s 22 of HPA 1967 covers contract of indemnity and, inter alia, submits as follows:

(a) Section 22 of the HPA 1967 provides:

> Guarantor not to be bound in certain cases
>
> Where a guarantor of the performance of the obligations of the hirer under a hire-purchase agreement enters into an agreement binding the guarantor —
>
> (a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement; or
>
> (b) to perform an obligation in respect of goods other than the goods comprised in the hire-purchase agreement,
>
> the agreement so entered shall be void unless the agreement is executed by the guarantor in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

(b) The learned sessions court judge had taken the view that the wordings of s 22 of the HPA 1967 meant that it does not cover contracts of indemnity.

(c) Section 22 of the HPA 1967 shows that the term 'guarantee' is not used anywhere. Instead, the terms 'guarantor' and 'agreement' are employed throughout the said statutory provision.

(d) These two terms, ie 'guarantor' and 'agreement', are not defined in the HPA 1967. However, there is a definition of the term 'contract of guarantee' under s 2 of the HPA 1967 which reads as follows:

> Interpretation
>
> (1) In this Act, unless the context otherwise requires —

> 'contract of guarantee' means, in relation to any hire-purchase agreement, a contract made at the request, expressed or implied, of the hirer to guarantee the performance of the hirer's obligations under the hire-purchase agreement, but does not include the dealer or a person engaged at the time of giving the guarantee in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement, and the expression 'guarantor' shall be construed accordingly.

(e) Section 22 of HPA 1967 does not cover contracts of indemnity because of the usage of the term 'guarantor', and because the term 'contract of indemnity' (or any term similar to that) was not expressly used in the said statutory provision.

(f) The term 'agreement' is used in s 22 of HPA 1967. If parliament had really intended to limit the application of s 22 of HPA 1967 to just contracts of guarantee, then it would have used the term 'contract of guarantee' in place of the term 'agreement'. All the more so the term 'contract of guarantee' is expressly defined in HPA 1967, whereas the term 'agreement' is not.

(g) The phrase 'an agreement binding the guarantor to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement' contained in section 22(a) of HPA 1967 suggests a contract of indemnity. In *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Law Report 289, one of the issues before the English Court of Appeal was whether the clause in the agreement was a guarantee or indemnity:

> 1(D). Argo and Mr Rowland hereby agree at the joint request of Fieldham and Mr Lewis to guarantee to Laytons the repayment of the said loan by Fieldham together with interest thereon and in consideration thereof Fieldham will pay to Argo a fee at he rate of 2 per cent per annum on the principal amount of the said loan from time to time outstanding calculated on a day to day basis and payable quarterly in arrear and Mr Lewis agrees that he will indemnify and keep indemnified Argo and Mr Rowland and his personal representatives against any losses damages costs expenses or charges which Argo and/or Mr Rowland and his personal representatives may incur by reason of having given the guarantee contained in this sub-clause.

Stephenson LJ said:

> Applying these tests, and bearing in mind also that the defendant could, as, in our judgment, Mr Stamler right claimed, be liable under cl 1 (D) to pay more to the plaintiffs (for instance, the costs of the legal proceedings by Laytons against the plaintiffs on the guarantee) than the plaintiffs under the same clause were liable to pay to Laytons, we have no doubt that Mr Justice Mocatta was right in holding the obligation imposed on the defendant by cl 1 (D) to be one of indemnity and not of guarantee…

(h) the above case was referred to by Abdul Malik Ishak J in *Siow Kwang Joon & Anor v Asia Commercial Finance (M) Bhd* [1996] 3 MLJ 641 where he stated:

> Thus, in the event the person liable under the agreement is liable even though the principal debtor is not in default (*Chitwell Shipping Ltd v State Bank of India, The World Symphony* [1987] 1 Lloyd's Rep 165) or for that matter he is liable for

a sum greater than the principal debtor (*Agro Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at p 296), then that agreement will in all probability be construed as an indemnity.

(i) An analysis of s 22 of HPA 1967 in its entirety would show that the parliament had envisaged the situation where the guarantor, ie the person who had entered into a 'contract of guarantee' to guarantee the performance of the hirer's obligations under the hire purchase agreement, is required not to give an obligation larger than that of the hirer's. As such, s 22 of HPA 1967 was designed for the protection of the guarantor in such a situation by requiring the guarantor to sign the agreement before a Magistrate, Commissioner for Oaths or Notary Public respectively, so as to ensure that the guarantor does so with open eyes and is fully appreciative of the consequence of such an undertaking.

(j) Section 22 of HPA 1967 does cover contracts of indemnity and as such, the learned sessions court judge in deciding otherwise, erred in law and in fact.

[9] In addition, the appellant asserts that upon the true construction of the purported guarantee and indemnity the appellant is bound to pay an aggregate sum which is larger than the balance originally payable under the hire purchaser agreement and submit as follows:

(a) by clause 1 of the guarantee and indemnity, the appellant is obliged to indemnify the respondent against all expenses suffered by the plaintiff in consequence of any failure by the hirer to perform any of the hirer's obligations under the hire purchase agreement, including legal costs on a full indemnity basis.

(b) further, by clause 4 of the guarantee and indemnity, the appellant is liable to indemnify the respondent against its liability for the breach of any warranty or representation in respect of the said motor vehicle, if the hirer brought a claim against the plaintiff as a result of the same.

(c) there are no such corresponding clauses to clauses 1 and 4 in the hire purchase agreement.

(d) the hire purchase agreement does not contain any clause obliging the hirer to indemnify the respondent against all legal costs on a full indemnity basis, nor is there any clause which prevents the hirer from bringing an action against the respondent for any warranty or representation in respect of the said motor vehicle.

(e) a comparison of the two agreements clearly shows that the appellant had by entering into the guarantee and indemnity bound himself to pay to the plaintiff an aggregate sum which is larger than the balance originally payable under the hire purchase agreement.

[10] The appellant asserts that the purported guarantee and indemnity is null and void by virtue of s 22 of the HPA 1967 and submit as follows:

(a) since the appellant had, by entering into the guarantee and indemnity, bound himself to pay to the plaintiff an aggregate sum which is larger than the balance

originally payable under the hire purchase agreement, the guarantee and indemnity should have been executed before a Magistrate, Commissioner for Oaths or Notary Public pursuant to s 22 of the HPA 1967.

(b) the parties do not dispute that the guarantee and indemnity was not executed in front of a Magistrate, Commissioner for Oaths or Notary Public. A perusal of the guarantee and indemnity clearly shows that it was executed in front of one Won Hian Mein of UOL Credit Sdn Bhd, Kuching. In consequence, the guarantee and indemnity is void pursuant to s 22 of the HPA 1967.

[11] Further, the appellant complains that it was wrong for the learned sessions judge to enter judgment when the application was only for trial of issues and submits as follows:

(a) the following is stipulated in O 28 r 10 of the Subordinate Court Rules 1980:

> 10. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

(b) even if the learned sessions court judge was not wrong in deciding the preliminary issues in favour of the respondent, the decision will not substantially dispose of this cause of action or render a trial unnecessary.

(c) the preliminary questions which were determined during the trial represented only one of the several grounds of defences pleaded by the appellant in his defence and counterclaim. These other defences include, amongst others, a denial that the appellant had signed the alleged guarantee and indemnity, misrepresentation by the respondent, and other breaches of the HPA 1967.

(d) besides these various other defences, the appellant had also counterclaimed against the respondent for the alleged guarantee and indemnity to be rescinded and declared null and void.

[12] The appellant concludes as follows:

(a) the decision of *Su Chii Leong*is binding on the learned sessions court judge;

(b) section 22 HPA 1967 applies to contracts of indemnity;

(c) the appellant had bound himself to pay to the respondent an aggregate sum which is larger than the balance originally payable under the hire purchase agreement by entering into the guarantee and indemnity;

(d) the guarantee and indemnity is null and void by virtue of s 22 of HPA 1967 since it was not executed in front of a Magistrate, Commissioner for Oaths or Notary Public;

(e) the decision on the preliminary issues had not substantially disposed of this cause or action or rendered a trial unnecessary. Therefore, it was wrong in law for the learned sessions court judge to enter judgment against the appellant as prayed for in the amended statement of claim.

[13] The respondent inter alia submits as follows:

(a) There is no question of the appellant having bound himself to pay an aggregate sum which is larger than the balance. The appellant has misunderstood s 22(a) of HPA 1967 and have overlooked s 21(3) of HPA 1967 for the following reasons:

(i) under the guarantee and indemnity, the guarantor is only required to indemnify the respondent's costs, which indemnity of legal costs does not contravene s 22 of the HPA 1967. The performance of the payment of costs is a different and/or separate obligation of the guarantor, which is valid.

(ii) in the statement of claim, the respondent is claiming against both the 1st defendant and the appellant, the same sum of RM47,023.17 and interest at the rate of 8% per annum from 4 July 2000 till date of full and final payment. The question of costs is a separate and different obligation altogether. No where in the guarantee and indemnity is it stated that the appellant is required to pay more than RM47,023.17. By the same analogy, it cannot be said that the appellant has bound himself within the meaning of s 22(a). There was no binding agreement to pay the legal costs because the costs might never become payable i.e. the costs are contingent — if the hirer never default, the costs will never be incurred and the appellant will not have to pay it.

(b) Section 22 of HPA 1967 does not apply to a letter of indemnity. A reading of the plaintiff's guarantee and indemnity will confirm that the plaintiff's guarantee and indemnity is an indemnity. Clause 1 of the guarantee and indemnity reads as follows: '……..I/We further jointly and severally undertake to indemnify you against all losses expenses (including legal costs on a full indemnity basis) charges and damages incurred or suffered by you in consequence of any failure by the Hirer to perform any of the Hirer's obligations under the Hire Purchase Agreement.'

Clause 3 provides that 'I/We further jointly and severally agree that my/our liabilities under this Guarantee and Indemnity shall be as principal debtors and waives all suretyship and other rights inconsistent with this Clause and my/our liabilities shall not be in any way discharged diminished or affected by …… any release of or compromise with the Hirer or any Agreement not to sue the Hirer or the impairment of any security or the failure to realize or enforce such security or any variation in the terms of the Hire Purchase Agreement or the invalidity unenforceability cancellation termination or recession of the Hire Purchase Agreement'.

(c) In this case, the guarantee and indemnity is not a guarantee but an indemnity and therefore s 22 does not apply to the respondent.

(d) Section 21(3) HPA 1967 allows for an exception to section 22 in that, s 21(3) HPA 1967 expressly permits an agreement by the guarantor thus binding him to the performance of any obligation that is not one of the obligations imposed on the hirer under the hire purchase agreement.

(e) In this case, the appellant undertook a further and/or additional obligation to indemnify the plaintiff in consequence of any failure by the hirer to perform any of the hirer's obligations under the hire purchase agreement. This is permissible by virtue of s 21(3) HPA 1967. The effect of s 21(3) is that a guarantor's liability is limited to the extent of the hirer's obligations he has guaranteed; if he has undertaken additional obligations, in which case he will remain bound to that extent. In *Equipment Investments v Dowthvaite & Co* (1996) 16 FLR, it was argued that the guarantee contravene s 19(1)(a) [similar to our s 22(a)] as it would require the guarantor to pay interest in respect of moneys which were overdue (i.e. larger than the balance originally payable under the hire purchase agreement). The court rejected this argument because it could not be said that the guarantor bound himself within s 19(1)(a) to pay the additional contingent amount in respect of charges for overdue installments. There was no binding agreement to pay these amounts because they might never become payable As Gibbs J put it:

> For an agreement (ie guarantee) to come within s 19(1)(a) it must be possible to say of it from its inception that it binds the guarantor to pay to the owner an aggregate sum that is 'larger than the balance originally payable under the hire purchase agreement'……..When an agreement guarantees the making of payments that will only become due if further events supervene, and those events may never occur, it does not bind the guarantor in the same way to make those payments. He may never have to make them, and the agreement is not one 'binding' him too pay an aggregate sum larger than the specified 'balance' …….. moneys may possibly, but will not necessarily, be payable is not within the mischief at which the subsection is aimed.

[14] For determining the outcome of this appeal, I have to in the first place decide whether the purported guarantee is valid in law on the facts of this case and even if it is valid and binding on the appellant was it procedurally correct for the learned sessions judge to enter judgment summarily when there are other defences raised by the appellant.

[15] Before I can decide on the 1st issue stated above it is necessary for me to go through all the provisions of the HPA 1967 and determine the scope of the HPA 1967. In having done so I take the view that the HPA 1967 by its nature is a social legislation which is intended to protect the hirer, owner and some third parties mentioned in the Act for example guarantors as in this case. The Act places a caveat to the caveat emptor and laissez fare doctrine under the common law and forces all persons who are parties to the hire purchase agreement directly or indirectly to act within the legislative terms of the HPA 1967 and forego their usual rights and remedies under the Contracts Act and other relevant provisions of the law such as Sale of Goods Act etc. Any conduct, terms or instruments to defeat the protection given under the Act must be construed to be in breach of the statutory provision (unless there is a saving provision or like) and in consequence, must be considered to be null and void.

[16] In this case, to construe the legality of the guarantee, it is essential to look at the statement of agreed facts which has been set out above. The appellant's argument

is that the purported guarantee and indemnity is in actual fact a guarantee; it was not executed in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public, and therefore is null and void, pursuant to s 22 of the HPA 1967. This issue was not before the court in *Equipment Investment* and in consequence, the case is not relevant for purpose of deciding this point.

[17] The respondent's argument is that the guarantee or indemnity is in actual fact an indemnity which is saved by s 21(3) of HPA 1967.

[18] There is a distinction between a guarantee and indemnity. Often documents are drafted in a manner to cover the obligations under guarantee as well as indemnity in ordinary contracts without much thought to the legal incidence of drafting documents in such manner and form, for these terms are not interchangeable terms, nor one and the same. The rights and obligations arising from such contracts materially differ and in consequence, combining both contracts into one agreement can be a subject matter of unnecessary disputes and actions, as seen in this case. Such rights and obligations are given statutory force and recognition under various Acts and in particular Contracts Act 1950 ('CA 1950'). I have documented the detail exposition of the law, principles and practice in a summary form elsewhere. However, for the purpose of appreciating the distinction and to be released from the confusion and to arrest the notion in this case that guarantee and indemnity are interchangeable terms or like, it is necessary to set out the working principles of guarantee and indemnity which are as follows:

(a) Indemnity generally means an undertaking whereby one agrees to indemnify another upon the occurrence of an anticipated loss. Here the loss may arise out of contract or in consequence of a tort. On the other hand, a guarantee will relate to a promise of one person to pay the obligation of another. An indemnity is an independent contract by one party to keep the other harmless against loss, whereas a contract of guarantee is a collateral contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promise.

Section 77 of CA 1950 defines contract of indemnity as follows:

> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity'.

Section 79 of the CA 1950 defines contract of guarantee as follows:

> A 'contract of guarantee' is a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.'

(b) A contract of guarantee is always a tripartite agreement but a contract of indemnity need not be so. In a contract of indemnity, the person who promises to make good the loss is called the indemnifier and the person who is going to be indemnified is called the indemnity holder under the Act.

A In contrast, the contract of guarantee involves the creditor, principal and the surety i.e. guarantor. Thus the definition and legal obligation of indemnifier and guarantor is not one and the same. The liability of the indemnifier is primary as opposed to a guarantor where the liability is secondary.

Section 78 of CA 1950 sets out the rights of the indemnity holder when sued. B Under the section, the indemnity holder can recover from the promisor all damages, costs and any money paid as a result of the compromise of the suit, provided he acted prudently or on the authority of the promisor. It will appear from the wordings of s 78 of CA 1950 that the promisor can be compelled to pay even before the indemnity holder has discharged his liability, provided the liability of the indemnity C holder has become absolute. In its widest sense, a contract of indemnity will include a contract of guarantee. A contract of indemnity under this section is defined in a narrow sense. There are other forms of contract of indemnity. For example, contract of insurance which by nature is a contract of indemnity and can be termed as a contingent contract. The most common example of an indemnity is the contract of D insurance. However, there are a number of instances where indemnity is implied. For example, an agent is liable to the principal for money spent on his behalf. Such obligations may arise under the common law or statutes.

In *Secretary of State v Bank of India* 65 IA 286, the Privy Council made the following observations:

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> It is a general principle of law that when an action is done by one person at the request of another, which act is not in itself manifestly tortuous to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to indemnity from him, who requested that it should be done.

F In *Gajanan v Moreshar* (1942) Bom 402, the Indian Court made the following observations:

> Section 124 and 125 (which is pari materia to our s 77 and 78 of the Contract Act) are not exhaustive of the law of indemnity and the courts here would apply the same equitable principles that the court in England do.

G In *Khetarpal v Madhukar Pictures* 65 IA 286, the Indian Court made the following observations:

> an indemnity holder could sue for specific performance of the contract of indemnity even before he incurs the damage provided that it is shown that an absolute liability has been H incurred by him and that the contract of indemnity covers the said liability.

In *Re Richardson; Ex parte the Governor of St Thomas Hospital* (1911) 2 KB 705, Buckley LJ made the following observations:

> Indemnity is not necessarily given by repayment after payment. Indemnity requires that the I party to be indemnified shall never be called upon to pay.

In *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141, the court considered the provisions of s 77 CA 1950 and asserted that in the construction of contracts, the court is not bound by the labels affixed onto a contract, but has the duty to construe it as a whole to determine its true nature.

[19] Section 78 of CA 1950 sets out the rights of indemnity holder when sued:

(a) The promise, in the contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor –

(a) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.

(b) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit; and

(c) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

This section adumbrates on the rights of indemnity holder. The learned authors of *Halsbury's Laws of England* make the following observations:

> in equity, the rules of which now prevails in all courts, even in the absence of such a special agreement, the person entitled to the indemnity may enforce his right as soon as his liability to the third party has arisen, and, therefore, he may obtain, relief before he had actually suffered loss. He may, therefore, in an appropriate case, obtain an order compelling the promisor to set aside a fund out of which the liability may be met or to pay the amount due directly to the third party, or even when the promisor is under no liability to the third party as is the case in contracts of mere indemnity, to the promisor himself. Nor is the party indemnified precluded from obtaining relief by the fact that his liability to the third party cannot be effectively enforced against him.

In *Bepin v Chunder Seekur Mookerjee* (1880) 5 Cal 811, the court made the following observations:

> in the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered.

(b) Section 80 of CA 1950 says that any benefit the principal debtor may constitute sufficient consideration to the surety for giving the guarantee. Further, unlike a contract of indemnity, in a contract of guarantee, it is necessary for the surety to give the guarantee at the request of the debtor.

(c) The law permits the guarantor to recover any payment made to the creditor from the debtor. However, in the case of indemnity, the promisor may not be able to recover from the third party if there is no privity of contract.

(d) Section 81 of CA 1950 specifically states that the liability of surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. Thus, the liability of the surety is same as that of the principal debtor or can be less if it is provided in the contract.

(e) As a general rule, the creditor is not bound to exhaust his remedies against the principal debtor before suing the surety. However, statutes, rules or regulations may provide restrictions. Any variation of the contract without the surety's consent will discharge the liability of the surety. Notwithstanding the admission by the principal debtor, a surety's liability must be proved independently if contested.

(f) Thus, a surety's liability is discharged under the CA 1950 if there is a variance in terms of contract; release or discharge of principal debtor; when creditor compounds with, gives time to, or agrees not to sue principal debtor; by creditor's act or omission impairing surety's eventual remedy; or loss of surety's right to benefit of creditors securities.

(g) Surety's rights are also spelled out in the CA 1950. A surety has the right of benefit of the creditor's security. This right will only arise upon the payment of the debt to the creditor. Under s 93 of CA 1950, the surety has the right of subrogation upon the payment of the debt to the creditor. The right of subrogation will entitle the surety to step into the shoes of the creditor and is entitled to all the remedies, which the creditor could have enforced against the principal debtor. The creditor is obliged to hand over the securities if any held to the surety. The surety upon payment of debt may also claim dividend, if the principal debtor becomes insolvent. Further, s 98 of CA 1950 specifically requires the principal debtor to indemnify the surety. If there are co-sureties, the co-sureties are obliged to contribute. If one surety is compelled to pay by the creditor, he may upon payment seek contribution from co-sureties as well as indemnity and other remedies from the principal debtor.

(h) Section 95 of CA 1950 specifically states that a contract of guarantee becomes invalid if it has been obtained by misrepresentation. A guarantee which has been obtained by means of keeping silence to a material circumstance is also invalid. Further a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety is not valid if that other person does not join.

(i) The surety will be discharged in accordance with general contractual principles, where the guarantee is illegal and void.

[20] From the principles adumbrated above it must be emphasized that a contract of guarantee and indemnity are different and in consequence debtors, creditors, sureties, indemnifiers etc simply cannot take the position that they can take shelter under any provisions of the law where the label for the agreement is coined as 'guarantee and indemnity' to the determent of the other contracting parties, more so when such terms are regulated by social legislation such as HPA 1967. An apt simile: in dealing with the Native Land Code the Federal Court in *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 stated that (at p 824):

> The provisions of the NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights — unless expressly provided for in the Code — would be void as being contrary to public policy.

In my view by analogy to this case, any person who does not strictly comply with the provisions of HPA or attempts to contract out of the strict provisions of s 22 of HPA or if the conduct of the parties to the hire purchase agreement does not strictly comply with the procedural requirements such as getting the signatures of the hirer or guarantor in empty forms without filling in the particulars or not getting it properly attested as in this case may be fatal and the instrument may be declared void.

[21] The definition of agreement, contract, guarantee and indemnity under CA 1950 when read with the provisions of HPA will become materially different and does not have the same effect as HPA to a certain extent restricts or limits the scope of rights and obligations of guarantor or indemnifiers as provided in CA 1950. Because, in my view, it is the intention of parliament to do so for reasons stated above. In consequence, in this case it is necessary and essential to confine the interpretation of guarantee, indemnity, agreement, contract, etc within the context and spirit of HPA. In *Su Chii Leong*, Justice Clement Skinner has very eloquently set out the scope of HPA and that too relating to guarantee as in this case. The learned judge says:

> In my judgment, the respondent cannot be right or correct in its argument for the following reasons. The Hire Purchase Act 1967 was enacted for the benefit or protection of the consumer. The purpose behind requiring a guarantor who binds himself to pay the owner an aggregate sum which is larger than the balance originally payable under the hire purchase agreement, to execute his guarantee before a magistrate, a Commissioner for Oaths or a notary public is to ensure that the guarantor understands the true purport and effect of the agreement he has signed or that he at least has had the opportunity of doing so by attending before such a person, so that he can be said, to have entered into the transaction with open eyes. It would defeat the purpose behind s 22 of the Act if the respondent's argument is upheld. I …
>
> … With regard to the respondent's second point, namely, that the appellant remained liable as principal debtor under cl 3 of the guarantee, I regret I found the argument untenable because we are here not at all concerned with whether the hire purchase agreement is invalid or unenforceable or has been terminated. We are here concerned with whether the guarantee itself is void for the reasons stated in s 22. If it is void, then the guarantee, is worthless and no reliance can be placed on the principal debtor clause found in it.
>
> Reverting to the guarantee which was executed by the appellant in this case, I agree with counsel for the appellant that for the reasons given by him, the appellant had, when entering into the guarantee, bound himself to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire purchase agreement. The guarantee should, therefore, have been executed in the presence of a magistrate, a Commissioner for Oaths or a notary public and not having been so executed, is void.

[22] My views are similar to those expressed in the judgment for reasons stated above. In the premise, I hold that the guarantee in this case is not in compliance with s 22 of HPA 1967 and in consequence it is void, and s 21(3) does not per se relate to indemnity and it is questionable inter alia whether it will be proper for financiers to seek for indemnity without giving consideration from a social guarantor or a like under the HPA 1967. Further, subordinate courts are bound to follow the decisions of its apex courts and they have limited discretion to apply the per incuriam rule and if they do so it is necessary and essential to give detailed reasons for departing.

[23] On the complaint that the learned sessions judge ought not to have entered judgment for the respondent, I am inclined to accept the argument of the appellant. I take the view that the parties to the action had only agreed for the issues to be tried and it was not procedurally correct for the learned sessions judge to have entered judgment where there are other issues which need judicial consideration and on the facts of this case it cannot be dismissed off summarily. For example, even if the guarantee is valid, the appellant as in this case can raise other issues and if raised in the right perspective, it may be a triable issue.

[24] In conclusion, it is my view that the respondent financier has not complied with the clear provisions of s 22 of the HPA 1967 and wants to rely on sub-s 21(3) which is very much slackly worded. This subsection does not refer to an indemnity even though the respondent's argument is grounded on that basis. The indemnity at law is different from that envisaged under sub-s 21(3) of the HPA 1967. The respondent's argument that the claim of the respondent can be saved by the indemnity provision and the fact that the respondent is only claiming a sum which is only limited to what a guarantor has to pay does not support legislative intention for enacting HPA 1967. Such proposition, I will say is a sterile argument in the face of HPA 1967 and ought not to be entertained as it will dilute the sanctity and solemnest of a social legislation intended to regulate the conduct and terms of parties involved in a hire purchase agreement.

[25] I have considered the arguments of the appellant and the respondent in detail and for the reasons stated above, it is my judgment that the appellant's appeal must be allowed with costs and the costs to be taxed and paid to the appellant by the respondent. I hereby order so.

Appeal allowed.

Reported by Peter Ling